Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

RICHARD D. WHITE, - - - - - - - *Petitioner,*

versus

COMMONWEALTH OF KENTUCKY - - *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

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August 11, 1998

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QUESTIONS PRESENTED

Whether the criminal complaint filed herein is invalid because it does not show on its face that it was sworn to before an officer authorized to administer oaths.

Whether the criminal complaint filed herein adequately sets forth grounds for probable cause under the principles enunciated in *Giordenella v. United States,* 357 U.S. 480 (1958).

Whether the blood test results relied on by the Commonwealth of Kentucky were secured as the result of an unlawful search or seizure in violation of the Fourth Amendment to the Constitution of the United States.

Whether the Commonwealth of Kentucky is estopped to introduce into evidence blood test results which it obtained through the Movant's detrimental reliance on the Commonwealth's false statements.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997
No. _____

Richard H. White, Petitioner
v.
Commonwealth of Kentucky, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard H. White, the petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered in the above-entitled case on May 13, 1998.

OPINION BELOW

The judgment of the Supreme Court of the Commonwealth of Kentucky (Appendix B) was entered on May 13, 1998.

JURISDICTION

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a).

QUESTIONS PRESENTED

Whether the criminal complaint filed herein is invalid because it does not show on its face that it was sworn to before an officer authorized to administer oaths.

Whether the criminal complaint filed herein adequately sets forth grounds for probable cause under the principles enunciated in *Giordenella v. United States*, 357 U.S. 480 (1958).

Whether the blood test results relied on by the Commonwealth of Kentucky were secured as the result of an unlawful search or seizure in violation of the Fourth Amendment to the Constitution of the United States.

Whether the Commonwealth of Kentucky is estopped to introduce into evidence blood test results which it obtained through the Movant's detrimental reliance on the

Commonwealth's false statements.

PARTIES

Richard D. White, Petitioner.

The Commonwealth of Kentucky, Respondent.

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STATUTE INVOLVED

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STATEMENT OF THE CASE

On August 16, 1996 Richard D. White (hereafter "White" or "Petitioner"), then an off-duty trooper with the Kentucky State Police (hereafter "K.S.P."), was involved in a single vehicle accident in which the truck he was driving overturned and struck a tree. As a consequence, White sustained a concussion and severe injuries to his neck, and was hospitalized at Crittenden County Hospital.

The Kentucky State Police officer who investigated the scene found no beer, no empty beer cans, and no other evidence of alcohol involvement, and attributed the accident to unsafe speed.

At the hospital, around 10:00 p.m., White awoke to find himself among friends, particularly KSP Sgt. Steve Humphries, KSP Lt. J.E. DeArmond, and Crittenden County Sheriff Floyd

Andrews.

Humphries suggested that White consent to a blood alcohol test, in order to prove his apparent sobriety. Humphries assured White that he wanted the blood test results in order to show his superiors that White was not drunk at the time of the accident, and that the blood alcohol report would only be used for administrative purposes, not for a criminal investigation. The two witnesses, Emergency Medical Technician Donald Arflak and Sheriff Floyd Andrews, testified that Humphries told White, without qualification, that the test result would be used "for administrative purposes only."

Humphries told White that if he did not consent, it would make him look uncooperative, and he would probably lose his job. However, if White consented, then he would only get a 21-day suspension and a transfer to another post, at worst.

After repeated urging and assurances that the blood test results would be used "for KSP administrative purposes only," White agreed to sign a "consent" form. The results of the testing

indicated a .18 blood alcohol level. White was then asked to resign his employment with the K.S.P.

On August 19, 1996, a criminal complaint was filed against White charging him with driving under the influence of alcohol, pursuant to KRS 189A.010. A summons was issued, and White was never arrested.

White subsequently filed a Motion to Dismiss and also a Motion to Suppress the blood alcohol evidence. A hearing was held on February 26, 1997, and the Motion was overruled by Crittenden District Judge Rene Williams. On the morning of trial, White entered a guilty plea pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970), reserving his right to appeal from the adverse rulings of the court on his motions.

White appealed to the Crittenden Circuit Court, arguing that the blood test results should have been excluded, and that the case should have been dismissed because the initial Complaint is facially invalid. On August 7, 1997, Crittenden Circuit Court denied White's appeal. The defendant then filed a

Motion for Discretionary Review with the Kentucky Court of Appeals pending a previously filed Motion for Enlargement of Time. The Court of Appeals denied defendant's Motion for Enlargement of Time on November 6, 1997.

Petitioner then filed a Motion for Discretionary Review with the Kentucky Supreme Court. That court denied the Motion on May 13, 1998. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE COMPLAINT IS INVALID.

This prosecution was initiated by a criminal complaint filed by Capt. Ron Allgood, K.S.P., on August 19, 1996. That Complaint purports to have been sworn to before "Alan C. Stout, Crittenden County Attorney." It is clear, however, that a County Attorney is not among those officials authorized to administer an oath. OAG 85-31. The Complaint, therefore, does not show on its face that it is "supported by oath or affirmation," as required by R.Cr. 2.02.

It is well settled that a prosecution for a crime must be

preceded by a formal accusation. R.Cr. 2.02 provides, in pertinent part:

> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made under oath and signed by the complaining party before a judge or a person who is legally empowered to administer oaths.

Therefore, as the official commentary to R.Cr. 2.02 notes:

> ...the complaint becomes the charging instrument. The complaint provides a record and written evidence of the formal charge. It is a formal criminal charge, similar to the civil complaint.

The Complaint, therefore, is the initial step in the prosecution, *Crooks v. State*, 15 So.2d 913, 914 (Ala. App. 1943), and the foundation of the jurisdiction of the magistrate, *Shappee v. Curtis*, 127 N.Y.S. 33 (1911); *McKelvey v. Marsh*, 71 N.Y.S. 541 (1901).

Thus, a legally effective criminal prosecution requires that a formal charge be openly made against the accused. Absent such a formal accusation, the accused may demand to be

discharged from custody. In this respect, a facially invalid complaint is the same as no formal accusation at all. 1 C. TORICA, WHARTON'S CRIMINAL PROCEDURE §207 at nn. 9-11 (13th ed. 1989).

As this Court has noted:

> A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated.

U.S. v. Patterson, 150 U.S. 65, 68 (1893); *Albrecht v. U.S.*, 273 U.S. 1 (1927)("a person may not be punished for a crime without a formal and sufficient accusation, even if he voluntarily submits to the jurisdiction of the court"); *People v. Buffo,* 149 N.E. 271 (Ill. 1925)(to give a court jurisdiction of the subject matter in a criminal case it is essential that the accused be charged with a crime).

It is obvious that no valid complaint was filed in the instant case. The "Complaint" filed by Capt. Allgood does not show, as it must, that it was made under oath. *Ex Parte Burford,* 7 U.S. (3 Cranch) 448, 452 (1806)(per Marshall, C.J.).

In this regard, the attention of the Court and counsel is respectfully directed to *New Albany v. Dalton,* 661 N.E.2d 1132 (Ohio App., 10 Dist., 1995), a case closely analogous to the case at bar. The Complaints in that action charged the defendant, Woodrow A. Dalton, with Assault and Disorderly Conduct. After Dalton had been found guilty by a jury, he moved to dismiss the complaints "on the basis that they were not properly executed in violation of Crim.R. 3 and therefore the trial court's jurisdiction was never invoked." *Id.*, 661 N.E.2d at 1134.

In its opinion, the Ohio Court of Appeals first noted that Ohio's Criminal Rule 3, like Kentucky's R.Cr. 2.02, requires that a complaint "be made under oath before any person authorized by law to administer oaths." *Id.* The court observed that the prosecutor had argued that Dalton waived his right to raise this defense by going to trial on the issue. It added:

> However, defenses based on defects in the complaint which relate to lack of jurisdiction or failure to charge an offense may be raised at any time during

the pendency of the proceeding. Crim R. 12(B)(2)

New Albany v. Dalton, 661 N.E.2d at 1135; *cf.,* CR 12.08 (3).

The court then continued:

> The filing of a valid complaint is a necessary prerequisite to a court's acquiring jurisdiction. Furthermore, the failure to present a properly sworn affidavit is a defect that deprives a court of subject matter jurisdiction and cannot be waived by a defendant. In [*State v.*] *Green,* 548 N.E.2d 334 (1988), the charging officer signed the complaint, but did not sign the jurat. The Portage County Court of Appeals held that an unsworn complaint "is void and any conviction resulting therefrom would be void also."

New Albany v. Dalton, 661 N.E.2d at 1135 (some citations omitted).

Applying these rules to the case before it, the court held:

> Since the charging officer in the instant case did not file properly sworn complaints in compliance with Crim.R. 3, the trial court did not have jurisdiction of the subject matter regarding the disorderly conduct and assault charges; thus, those convictions are void.

New Albany v. Dalton, 661 N.E.2d at 1135.

A similar rule must govern the case at bar. The instant complaint does not show on its face, as it must, that it was

sworn to before an officer empowered to administer an oath.[1] It is, therefore, facially invalid, a nullity, and the conviction obtained thereunder is void *ab initio.*

II. THE COMPLAINT DOES NOT SHOW PROBABLE CAUSE.

The complaint suffers from yet another infirmity, namely, it fails to show that the complainant had probable cause to believe that a crime had been committed.

The Complaint alleges only that "the Defendant unlawfully operated a Motor Vehicle under the influence of Intoxicating Beverages on Highway 91 in Crittenden County, Kentucky."

Such conclusory language is clearly inadequate. In this regard, the Court's attention is directed to its prior holding, *Giordenello v. U.S.*, 357 U.S. 480 (1958). In its opinion, this

---

[1] It is possible that Mr. Stout is, in fact, a notary public. This would not validate the Complaint, however, since the Complaint must show on its face that he was such an officer. *Hart v. Grigsby,* 77 Ky. 542 (1879).

Court first set out the language of Rules 3 and 4, F.R.Cr.P., which are analogous to Kentucky's RCr 2.02-2.06, and the Fourth Amendment to the United States Constitution. The Court then observed:

> The purpose of the complaint...is to enable the appropriate magistrate, here a Commissioner... to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by the complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.
>
> ...it is clear that (the instant affidavit) does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The Complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made...In these circumstances, it is difficult to understand how the Commissioner could be expected to assess independently the probability that petitioner committed the crime charged. Indeed, if this complaint were upheld, the substantive requirements would be completely read out of Rule 4, and the complaint would be of only formal significance, entitled to perfunctory approval by the Commissioner. This

> would not comport with the purpose which a complaint is designed to achieve.

Girondello v. U.S., 357 U.S. at 486-87 (citation omitted).

An affidavit, therefore, must set forth enough facts and circumstances to permit the judge to measure the credibility of the affiant and the reliability of his information, and to reach an independent judgment as to whether the requisite probable cause exists. 1 C. TORICA, *supra*, § 154 at n. 11 (13th ed. 1989). As this Court has noted, the affidavit presented to a judge must contain "facts and circumstances," not mere "belief or suspicion." *Nathanson v. U.S.*, 290 U.S. 41, 46 (1933).

Similarly, in *Aguilar v. Texas*, 378 U.S. 108 (1964), this Court found an affidavit insufficient because there were no "facts or circumstances" alleged, on the basis of which the magistrate could "judge for himself" whether there was probable cause. He necessarily accepted "without question" the affiant's "suspicion," "belief," of "mere conclusion." *Id.*, at 112, 114.

This Court similarly stated, in *United States v.*

Ventresca, 380 U.S. 102 (1965) that an affidavit "must contain the underlying circumstances if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police."[2] *Id.*, at 109.

Kentucky follows the same rule. Kentucky courts formerly held that an affidavit need only state the "ultimate fact" that a crime had been committed. *Mattingly v. Comm.*, 247 S.W. 938, 940 (Ky. 1923). However, in *Henson v. Comm.*, 347 S.W.2d 546, 548 (Ky. 1961), the court rejected that rule. In addition to the ultimate fact, an affidavit must now set forth the affiant's grounds for his belief, i.e., it must state how and when the ultimate fact was observed. *Scamahorne v. Comm.*, 376 S.W.2d 686, 687 (Ky. 1964); *Smallwood v. Comm.*, 349 S.W.2d 830 (Ky. 1961); *Rogers v. Commonwealth*, 424 S.W.2d at 131.

Furthermore, in *Johnson v. Commonwealth*, 443 S.W.2d

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[2] Kentucky has specifically adopted *Ventresca* as setting out the correct rule in this regard. *Rogers v. Commonwealth*, 424 S.W.2d 130, 131 (Ky. 1968).

20 (Ky. 1968), the court stated:

> ...probable cause is not established by the statement in the affidavit of the ultimate fact as a fact instead of the information to support it....
>
> ...*[U.S. v.] Ventresca* does not stand for the proposition that an affidavit will support a search warrant where it is purely conclusory, stating only the affiant's belief that probable cause exists, without detailing any of the underlying circumstances upon which that belief is based. Even under the guidelines of *Ventresca*, the affidavit in the case at bar is insufficient. In order for the magistrate to determine probable cause, he would have had to look outside the affidavit to the surrounding circumstances.

Johnson v. Comm., 443 S.W.2d at 24.

The language of the instant Complaint, set out above, is obviously nothing more than a conclusory averment. The Complaint, therefore, is facially invalid under the foregoing rule. The trial court, therefore, never acquired jurisdiction to hear and adjudicate the case, and the conviction contained therein was and is void.

III. THE BLOOD TEST EVIDENCE WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT.

There is yet a third reason why Movant's conviction must be set aside. As noted above, the Commonwealth obtained the blood sample through deceit. The Commonwealth persuaded White to provide the blood sample voluntarily by telling him it would only be used for "administrative purposes." This deception invalidated the voluntariness of White's consent, and rendered the evidence inadmissible. This Court has noted:

> [W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.

Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973), *citing* *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

> [T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.
>
> [I]f under all the circumstances it has appeared that the consent was not given voluntarily ... then we

> have found the consent invalid and the search unreasonable.

Schneckloth v. Bustamonte, 412 U.S. 218, 228, 233 (1973).

This Court long ago indicated that consent to enter, when obtained by police deception, is invalid under the Fourth Amendment:

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures; and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded an equally in violation of his constitutional rights.

Gouled v. United States, 255 U.S. 298, 305-306 (1921).

Courts have uniformly invalidated consent obtained through police deception. In *State v. Badger*, 450 A.2d 336

(Vt. 1982), the Vermont Supreme Court upheld a trial court's finding that consent was not voluntarily given where police, among other things, misled a young defendant to believe that he would be subjected only to juvenile court treatment.

In *McCall v. People*, 623 P.2d 397 (Colo. 1981), police gained entry into a murder suspect's home by deceiving the suspect's parents, who were themselves police officers, into believing that their purpose in being there was to question the defendant as a witness. The Colorado Supreme Court took a dim view of such deception:

> Where, as here, entry into the home is gained by a preconceived deception as to purpose, consent in the constitutional sense is lacking.

Id., at 403.

In *State v. Pi Kappa Alpha Fraternity*, 91 N.E.2d 1129 (Ohio 1986), the initial entry of liquor agents into a fraternity house was held to be illegal where the agents gained an invitation into the house by fabricating their identities as well as the true purpose of their visit. The Supreme Court of Ohio said

that "consent obtained through deception cannot be said to have been given freely and voluntarily."

See also, State v. Ahart, 324 N.W.2d 317 (Iowa 1982) ([C]onsent given to a warrantless entry to a private home is invalid if the police, absent a show of cause, obtain entry by ruse); *Welch v. State*, 229 S.E.2d 390 (Ga. 1976) ("A consent which is the product of coercion or deceit on the part of the police is invalid").

The same rule has long been recognized in Kentucky. In *Miller v. Commonwealth*, 32 S.W. 2d 416 (Ky. 1930), the court held inadmissible evidence gathered by officers who gained "consensual" entry onto premises by the "ruse" of asking for a drink of water.

More recently, in *Cook v. Commonwealth*, 826 S.W.2d 329 (Ky. 1992), the court reaffirmed this rule. The court found that consent given by the Defendant in that particular case was valid. In doing so, however, it noted the absence of any trickery by the police:

> The record does not indicate that Cook was confused or tricked into giving his blood sample. He was fairly apprised of what the police wanted and why they wanted it, and the consent was freely and voluntarily given. That is all the Fourth Amendment requires.

Cook v. Commonwealth, 826 S.W.2d at 331.

The converse is obviously true: when the police intentionally deceive as to their purposes, the "consent" obtained thereby is invalid and any search conducted pursuant to that "consent" is unreasonable. It is clear that the Defendant, Rick White, was grossly misled as to the officers' purposes in seeking his consent. Police officers approached White as he lay in the hospital with a broken neck and a concussion, and told him they were there to help him save his job. They assured him that they wanted his blood test results "for administrative purposes only." They took advantage of their confidential relationship to White and of his disabled condition, to mislead him into "consenting."

In sharp contrast to the *Cook* case, the record here does show that White was "tricked" into consenting and it shows that

White was not fairly apprised of what the police wanted and why they wanted it. This is exactly what the Fourth Amendment forbids.

The Movant reiterates, evidence gained only through the exploitation of a suspect's Fourth Amendment rights is not admissible. The blood test results at issue must be suppressed, and the trial court should have so held.

IV. THE COMMONWEALTH IS ESTOPPED TO PRESENT EVIDENCE FURNISHED IN RELIANCE ON A PROMISE OF A LIMITED USE.

There is yet a fourth reason why the conviction must be set aside, namely, the Commonwealth is estopped to present evidence obtained through false promises of a limited use.

The doctrine of equitable estoppel may be invoked against the state under certain circumstances, particularly where there is a gross inequity. *Cross v. Commonwealth ex rel. Cowan,* 795 S.W.2d 65 (Ky. App. 1990); *City of Shelbyville v. Commonwealth,* 706 S.W.2d 426 (Ky. App. 1986).

The elements of equitable estoppel are: (1) conduct which amounts to false representation or concealment of material facts or at least which is calculated to convey the impression the circumstances are in a particular state that is inconsistent with the party's subsequent position; (2) the intention or expectation that such conduct will influence the other party to act; and (3) knowledge, constructive or actual, of the true facts.

The party claiming the estoppel must show: (1) a lack of knowledge and of the means of knowledge of the true facts; (2) a good faith reliance on the words or conduct of the party to be estopped; and (3) a detrimental change in position or status by the party claiming estoppel due to such reliance. *City of Shelbyville v. Commonwealth,* 706 S.W.2d at 429.

Applying these rules to the facts of the case at bar, the Commonwealth is clearly estopped to use the blood test evidence it fraudulently obtained from the Petitioner, Rick White.

First, the statements made by Sgt. Steve Humphries to the Petitioner were false, and known to be such. Sgt. Humphries persuaded White to "consent" to a search of the blood test results by promising that they were only needed to protect White's job, and that they would be used for such administrative purposes, and for no other purpose. This was not true and Sgt. Humphries should have known that it was not true.

Second, Sgt. Humphries made those statements with the intention of influencing White to act by "consenting" to the search. White was told that his "consent" would enable him to continue his employment, and that a failure to "consent" would "make him look uncooperative." These statements, obviously, were calculated to induce action by White.

Third, Sgt. Humphries made those statements with full knowledge that the blood test evidence gained thereby, if inculpatory, would not receive a limited use, but would be used to force White to resign his employment (or be fired) and to bring a criminal prosecution.

Fourth, White was subjected to this deception immediately after he had undergone a traumatic accident, and while he was lying in a hospital bed with a broken neck and a concussion. He obviously had no way of ascertaining the true state of affairs. *Cf., Schneckloth,* 412 U.S. at 229 (to determine voluntariness, court must consider "the possibly vulnerable subjective state of the person who consents").

Fifth, White's reliance on these misrepresentations was certainly taken in good faith, stemming from his reasonable belief that Sgt. Humphries was trying to help him to protect his interests.

Sixth, White obviously changed his position, i.e., he voluntarily furnished the requested blood sample.

Seventh, White suffered a detriment because of this reliance, since he was charged with a crime, and his ability to defend against that charge was severely prejudiced by the admission of this evidence.

In *Workman v. Commonwealth,* 580 S.W.2d 206 (Ky.

1979), an attorney for the Commonwealth made a plea bargain with the defendant in a murder case: if he voluntarily took and passed a polygraph examination, the charge would be dismissed. The defendant agreed and then took and passed the examination. The Commonwealth, however, refused to dismiss the charge. Instead, it prosecuted him and obtained a conviction. In reversing, the Supreme Court of Kentucky stated:

> The question is not whether the Commonwealth's bargain was wise or foolish. The question is whether the Commonwealth should be permitted to break its word.
>
> .....
>
> No distinction can be taken between the government as prosecutor and the government as judge...When as here, our historical ideals of fair play and substantial justice do not permit attorneys for the Commonwealth to disregard promises and fail to perform bargains, it does not permit the judge to allow such iniquities to succeed....We are faced with a hard choice, but in the last analysis we find it less evil that a criminal should escape punishment than that the government should be allowed to welsh on its bargain.

Workman, 580 S.W.2d at 207(citations omitted); *see also,*

Brock v. Sowders, 610 S.W.2d 593 (Ky. 1981)("the government should not be allowed to welsh on its bargain" - this time in the context of a plea bargaining agreement).

In *Commonwealth v. Brown*, 619 S.W.2d 699 (Ky. 1981), the Court succinctly summarized the holdings in *Workman* and *Brock:*

> Their thrust is that the government as promisor will be required to perform its bargain once the promisee has relied on the promise and performed his part of the bargain.

Comm. v. Brown, supra, 619 S.W.2d at 702.

It is true, or course, that prosecutors have no inherent authority to grant witnesses immunity from prosecution. Nevertheless, once a promise is made, and the witness relies upon it to his detriment, the government must perform its bargain. Such a rule is necessary to "preserve the integrity of the Commonwealth." *Brown*, 619 S.W.2d at 702. Since Rick White relied on the Commonwealth's promise of limited use, the government must be required to perform its bargain, The blood

test evidence, therefore, is inadmissible.

V. THE COURT OF APPEALS ERRONEOUSLY DENIED PETITIONER'S MOTION FOR ENLARGEMENT OF TIME.

As noted above, the Kentucky Court of Appeals denied the Petitioner's Motion for an Enlargement of Time in which to file his Motion for Discretionary Review. While the granting of such a Motion is within the court's sound discretion, Petitioner respectfully insists that under the facts of this particular case he should have been granted the requested enlargement, and that the court's refusal to do so was error.

In this first place, the requested enlargement was necessary because appellate counsel, who was not Mr. White's trial counsel, had not received the case file from trial counsel. He was, therefore, absolutely unable to file a proper Motion within the designated time. Second, Kentucky law favors the resolution of cases on their merits, and not on legal technicalities. This is especially true in criminal cases.

Commonwealth of Kentucky v. Wine, 694 S.W.2d 689 (Ky. 1985).

When defendant filed his Motion for Enlargement and subsequently filed his Motion for Discretionary Review, the court had before it several alternatives. It could have decided the case on the record, sanctioned counsel, or granted the requested enlargement. CR 76.12 (8). Instead, the court chose dismissal, which is the most drastic of all these remedies. This is not the remedy which the uncontradicted facts dictate should be applied in this case, since defendant had a meritorious defense to the action. *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986).

The rule in Kentucky at one time was strict compliance with the civil rules. That rule was specifically abrogated in *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990), which announced that the only failure of an appellant which would result in denial of an appeal occurs when the appellant fails to timely file a statement of appeal - a rule which could be

abrogated because it was jurisdictional in nature. In the instant case, the defendant timely filed his Motion for Enlargement of Time. The court, therefore, obtained jurisdiction to consider his appeal.

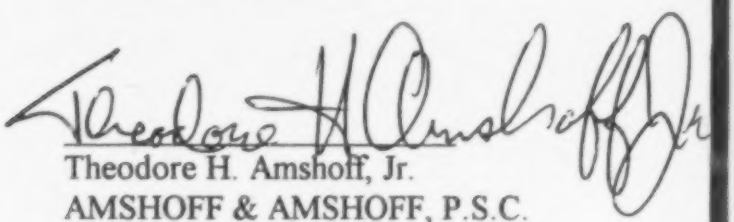
CONCLUSION

The Movant's criminal conviction must be set aside for four reasons:

(1) The criminal complaint filed by the County Attorney does not show on its face, as it must, that it was made under oath; (2) The complaint does not contain any of the underlying facts or circumstances from which the judge could have determined that the complainant had probable cause to believe that a crime had been committed; (3) The blood test evidence was obtained through deception and therefore was seized in violation of the Fourth Amendment; (4) The Commonwealth promised Rick White that the blood test evidence would only be used for "administrative purposes only." It is therefore estopped to use them as evidence in this criminal prosecution.

These reasons, taken together, clearly show that the conviction must be set aside and the case dismissed. Petitioner prays the court to grant him a writ of certiorari and upon hearing, to order that all charges against him be dismissed.

Respectfully submitted,



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Counsel for Petitioner Richard White

APPENDIX

APPENDIX A

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX B

SUPREME COURT OF KENTUCKY

97-SC-1004-D
(97-CA-2231)

RICHARD D. WHITE **MOVANT**

V. **CRITTENDEN CIRCUIT COURT**
NO. 97-XX-01

COMMONWEALTH OF KENTUCKY **RESPONDENT**

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED May 13, 1998.

Robert F. Stephens /s/

Chief Justice

Supreme Court, U.S.
FILED

No. 98 929 AUG 11 1998

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

RICHARD D. WHITE, - - - - - *Petitioner,*

versus

COMMONWEALTH OF KENTUCKY, - *Respondent.*

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

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August 11, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

APPENDIX C

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

No. 97-CA-2231-D

RICHARD D. WHITE MOVANT

V. ON MOTION FOR DISCRETIONARY REVIEW
FROM CRITTENDEN CIRCUIT COURT
ACTION NO. 8-XX-1

COMMONWEALTH OF KENTUCKY RESPONDENT

*** *** ***

ORDER

BEFORE: GUIDUGLI, JOHNSON, and SCHRODER, Judges

Having considered movant's motion for enlargement of time in which to file a motion for discretionary review, and being otherwise sufficiently advised, this Court ORDERS that this motion be, and it is hereby, DENIED. The Clerk of this Court is ORDERED to RETURN movant's tendered motion for discretionary review on this date.

ENTERED: Nov 6, 1997 /S/
JUDGE, COURT OF APPEALS

APPENDIX D

COMMONWEALTH OF KENTUCKY
CRITTENDEN CIRCUIT COURT
Case No. 97-XX-00001

RICHARD D. WHITE **APPELLANT**

V.

COMMONWEALTH OF KENTUCKY **APPELLEE**

Appellant, Richard D. White (White) appeals from a judgment of the Crittenden District Court convicting him of the offense of driving under the influence (KRS 189A.010) pursuant to his plea of nolo contendere, and after a suppression hearing in which the District Judge overruled his motion to suppress certain blood alcohol evidence.

The undisputed facts reveal that White, a probationary Kentucky State Police Officer, on August 16, 1996, after a day of golf during which he drank some beer, overturned the truck he was driving n a public highway, causing him to be hospitalized at Crittenden County Hospital with serious injuries.

At the suppression hearing Donald Arflack, rescue chief for the hospital rescue squad testified that he saw White at the scene of the accident and was present at the hospital during part of a conversation between White and Lt. Steven Humphries, lead investigating officer of the case. He testified that Humphries asked "about drawing a blood alcohol and he told Rick that it would be used for administrative purposes only." He was then asked to leave the room but was watching through a window and saw White sign the consent form for the test and saw the blood drawn.

Lt. Humphries testified that he smelled alcohol while talking to White in his hospital room and asked him if he'd been drinking. White admitted that he had. Humphries requested the blood alcohol test and White hesitated. There was a conversation just between the two during which "several what ifs" came up. Humphries testified that he told White if the test "comes back a 04 or 05, then it will only be used for administrative purposes only." Humphries suggested some administrative possibilities should the test be 04 or 05, such as reassignment. He then got a consent form which was signed by White, and the blood sample was drawn. Humphries testified that in none of the discussions did he tell White that the blood samples would not be used for criminal prosecution should such be warranted, and that there was no discussion about what would happen if the blood alcohol content exceeded .10. White's test result was .18.

Crittenden County Sheriff, Floyd Andrews, testified that while in White's room he heard Humphries tell White that if he would submit to a blood test, he would use it for administrative purposes only. The Sheriff then left the room and did not hear subsequent conversations between White and Humphries. White was never placed under arrest. A few days later White was discharged from the Kentucky State Police and criminal charges were brought against him which resulted in this appeal.

The crux of this case is whether White voluntarily consented to the blood alcohol test, thereby negating the need for a search warrant. White contends his consent was not voluntarily given because he was deceived by the Commonwealth (Lt. Humphries) as to its intended use of the sample. The District Court did not believe or find that any such deception occurred. This Court finds no abuse of discretion in that finding or that the District Court was clearly erroneous. A simple reading of the transcript of the suppression hearing shows that the Court could have found either way.

In order to find for White, the Court would have to disbelieve the testimony of Lt. Humphries concerning all the conversations with White after everyone else had left the room. All the other testimony related to only part of the exchange between White and Humphries because those witnesses were not privy to all of the conversations.

The testimony indicates that rather than deceptive promises being made by Humphries to White, it was White who initiated the conversation about what would happen to him if his test did come back 04 or 05. It is clear that White believed that his test would be low and that all he had to worry about was how it would affect his employment as a state trooper. But the test came back four times higher than he expected. It is understandable that he then wished he had not consented.

White also argues that under Commonwealth v. Montgomery, the blood alcohol test should have been suppressed because it was taken over three hours after the accident. This Court has carefully reviewed Commonwealth v. Wirth, and agrees with White that the ruling in that case does not vitiate this Court's ruling in Montgomery. Surely no one argues that the Court cannot exclude evidence collected at a time or place so remote from the circumstances of the crime charged as to render it unreliable as a matter of law. The Wirth case simply dictates that each case be determined upon its on facts and circumstances.

In the present case, where over three hours elapsed before the test was taken, the chance of unreliability is great indeed. However, considering the totality of the circumstances which include the facts that from the time of his driving until the drawing of the sample three hours later, White was either unconscious or confined in an ambulance or hospital room in the presence of medical attendants and/or other officers of the law, the Court finds the delay not to be unreasonable.

WHEREBY IT IS HEREBY ORDERED that the opinion and judgement of the District Court is AFFIRMED.

This is a final and appealable order.

ENTERED this August 7, 1997.

/S/
Tommy W. Chandler
Crittenden Circuit Judge

MAIL COPIES TO:

Hon. Tommy W. Chandler
Counsel of Record
Hon. C. Rene Williams

APPENDIX E

COMMONWEALTH OF KENTUCKY
CRITTENDEN DISTRICT COURT
Case No. 96-T-00286

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. ORDER

RICHARD D. WHITE DEFENDANT

This matter is before the Court upon the Defendant's Motion to suppress the results of blood testing performed by Crittenden County Hospital. The Defendant also moves to dismiss for failure to set forth any grounds for probable cause in the complaint for Driving Under the Influence. Both parties have submitted legal authority in support of their respective positions.

This case involves an incident occurring on August 16th, 1996, in Crittenden County. The Defendant is charged with unlawfully operating a motor vehicle under the influence of intoxicating beverages on Highway 91 in Crittenden County. This complaint is signed by Captain Ron Algood of the Kentucky State Police.

The Defendant's motion to suppress is based on the "two (2) hour rule" previously adopted in this judicial district. The Circuit Court Judge of this district ruled in the case of Montgomery v. Commonwealth, Webster Circuit Court, Case No. 95-XX-00002, that a breathalyzer result or other chemical alcohol test result where the test was given more than two (2) hours after the act of driving by the Defendant is not admissible.

This same issue was addressed in another recent case in Crittenden County and the Commonwealth submitted a brief challenging that ruling as has also been done in this case. Then, two (2) days after the defendant mailed these motions, the Kentucky Supreme Court rendered a decision certifying several

points of law in D.U.I. cases.

This case, Commonwealth v. Wirth, ____ S.W. 2D ___, S. Ct. 1996, deals with questions directly related to the facts of this case. This Court, in reviewing the Commonwealth's argument and following the rationale of the Wirth case, ruled that the"two-hour" rule was no longer applicable in the 5th Judicial District. The Court sets forth it's discussion of this issue in the case of Commonwealth v. Theresa Hodge, a Crittenden County Case No. 96-T-00222:

DISCUSSION AND LAW

> The basis of the Defendant's motion to suppress lies in the case of Montgomery v. Commonwealth, Webster Circuit Court, Case No. 95-XX-00002. In this case, the Circuit Court ruled a test result taken more than two (2) hours after the alleged act of driving is inadmissible. This decision has not been challenged until the case herein when the Commonwealth filed an objection to Defendants motion to suppress. The Commonwealth points out that the Montgomery ruling is based only on a Ohio Statue cited by the defense as there was no response filed by the Commonwealth in Webster County.
>
> It is further noted that the "two-hour" rule has been codified by Ohio Statue {4511.19(d)}. Kentucky had adopted no such statute and so far, most Courts have decided this issue on a case-by-case basis. Further, the Newark case did not hold this as an absolute rule as blood withdrawn more than two hours after the time of the alleged violation may be admissible with supporting expert testimony.

The Kentucky Supreme Court has recently "certified the law" relating to several commonly dealt with issues in D.U.I. cases in the case of Commonwealth v. Michael Alan Wirth, S.W.2d ____, (Kentucky Supreme Court 1996). The Court held in regard to the consideration of extrapolation evidence and the time lapse issue as follows:

> Rhetorically, we have been asked when the lapse of time between driving and testing for alcohol intoxication becomes so great as to prevent a rational trier of fact from determining guilt based thereon. In this case we need not attempt to formulate a bright line rule nor anticipate every possible state of facts which might arise. For our purposes it is sufficient to say that the evidence presented here in support of a per se violation easily met the "beyond reasonable doubt" standard. While a trier of fact, whether it be a trial court or a jury, may have the power to disregard a compelling evidence or impose a standard of its own which is so great as to be incapable of satisfaction, such power does not logically validate the result. Measured against proper standards of evidentiary analysis, the decision of the trial court was in error.

Therefore, based upon the law as set forth by the Supreme Court of Kentucky in Commonwealth v. Wirth, the issue of the delay of time in this case is a proper issue for consideration by the finder of fact (jury).

The Court, therefore, adopts the same ruling in the case herein, Overruling the "two-hour rule" and overruling the Defendant's Motion to suppress the blood test results.

Next, the Defendant moves to dismiss based on a deficient complaint per Giordenella v. United States, 357 U.S. 480, 2 L.Ed.2d 1503 (1958).

The necessary requirements for a criminal complaint are set forth in RCr 2.02, wherein it states "the complaint is a written statement of the essential facts constituting the offense charged". In Kentucky, the citation or other charging instrument should generally advise the Defendant of the nature of the charge against him. It is not necessary to detail the essential factual elements although this is commonly provided. Howard v. Commonwealth. 554 S.W.2d 375 (Ky. 1977).

The elements of KRS 189A.010 applicable to this case are that a person:

(1) Operate , or be a physical control of, a motor vehicle anywhere in this state

(2) (a) While the alcohol concentration in his blood or breath is 0.10 or more grams of alcohol per 100 milliliters of blood or per 210 liters of breath, or

(b) While under the influence of alcohol

This particular complaint, while not full of explicit details, does state sufficient facts to apprise the Defendant he is accused of operating a motor vehicle while under the influence of intoxicating beverages on Highway 91 in Crittenden County, on August 16th, 1996. This provides him with the necessary information to begin preparation for his case, which is the basic reasoning for requiring such information.

WHEREFORE, the Court hereby OVERRULES both the Defendant's Motion to Suppress and Dismiss. This case will remain on the Court docket for a pretrial conference on

February 26th, 1997 at 10:00 a.m. and a jury trial on March 12th, 1997 at 10:00 a.m.

This the 6 day of February, 1997.

/S/

Rene Williams
Crittenden District Judge